314 U.S. 641 (D)

Office - Supreme Court
JUL 10
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 254

DORIS SHIPMAN HUNTEMAN, INDIVIDUALLY AND AS GUARDIAN, ETC.,

Petitioner,

vs.

NEW ORLEANS PUBLIC SERVICE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN W. HARRELL,
Counsel for Petitioner.

JAMES W. HOPKINS,
Of Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdictional statement	4
Louisiana law on solidary liability of co-tort feasors	4
Question presented	5
Reasons relied upon for allowance of the writ	5
Prayer for writ	9

Table of Cases Cited.

Ætna Life Insurance Co. v. *DeJean*, 185 La. 1074, 171 So. 450	4
Atwater v. *North American Coal Corporation*, 111 F. (2d) 125	8
Bowles v. *Commercial Casualty Insurance Co.*, 107 F. (2d) 169	7
Church Street Bldg. Corporation, In re, 299 U. S. 24, 57 Sup. Ct. 88, 81 L. Ed. 458	4
Collins v. *Metro-Goldwyn Pictures Corporation*, 106 F. (2d) 83	7
Collins v. *Miller*, 252 U. S. 364, 40 Sup. Ct. 347, 64 L. Ed. 616	8, 9
Curtis v. *Connly*, 264 Fed. 650	6
Hill v. *Chicago, etc., R. R.*, 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331	8
Menge v. *Warriner*, 120 Fed. 816	6
Palmer v. *Webster & Atlas Nat. Bank of Boston*, 61 Sup. Ct. 542	4
Quatray v. *Wicker*, 178 La. 289, 151 So. 208	4
Rumpf v. *Callo*, 16 La. App. 12, 132 So. 763	4
Shield v. *F. Johnson & Son Company, Ltd.*, 132 La. 773, 61 So. 787	4
Sibbach v. *Wilson & Co., Inc.*, 61 Sup. Ct. 422, 309 U. S. 650, 84 L. Ed. 1001	4

Page

Sidis v. *F. R. Publishing Co.*, 113 F. (2d) 806 ..... 7, 8
Thompson v. *Murphy*, 93 F. (2d) 38 6
United States v. *River Rouge Improvement Co.*, 269 U. S. 411, 46 Sup. Ct. 144, 70 L. Ed. 339 9

STATUTES CITED.

Federal Rules of Civil Procedure:
Rule 18 6
Rule 20 6
Rule 54(b) 5, 6
Rule 73(b) 6
Judicial Code:
Section 128 (28 U. S. C. A. 225) 5
Section 240 (28 U. S. C. A. 347) 4
Section 262 (28 U. S. C. A. 377) 4
Louisiana Civil Code of 1870, Article 2091 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 254

DORIS SHIPMAN HUNTEMAN, INDIVIDUALLY AND AS GUARDIAN, ETC.,
Petitioner and Appellant below,
vs.
NEW ORLEANS PUBLIC SERVICE, INC.,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Mrs. Doris Shipman Hunteman, individually and as guardian of her seven minor children, Viva Lucille, Dorothy Ann, Richard Elvin, Betty Jo, Thomas Harold, James Edward and Nancy Lou Hunteman, respectfully shows:

I.

Summary Statement of the Matter Involved.

On April 22, 1940 petitioner filed this suit for herself and her seven minor children in the United States District

Court for the Eastern District of Louisiana, New Orleans Division, to recover damages occasioned by the death of Henry Hunteman, her husband and father of the children, on January 11, 1940. Decedent was electrocuted at the site of the Southern Regional Agricultural Laboratory in New Orleans, Louisiana where he was working as a member of an independent subcontracting firm. Decedent received an electric charge causing his death when the steel cable of a crane or the boom of the crane came in contact with the electric line of the New Orleans Public Service, Inc. The crane belonged to Arthur J. Rife, the main contractor, and was operated by his employees. The defendants in the action are the New Orleans Public Service, Inc., Rife and his insurance carrier, The Liberty Mutual Insurance Company.

Petitioner in her complaint charges the New Orleans Public Service, Inc. and Rife with negligence causing the death of her husband. Independent and distinct, although concurrent, acts of negligence are alleged against these two defendants. There is and was no relationship between these two defendants. The New Orleans Public Service, Inc. is charged with negligence in maintaining its electric wires and not having them insulated, and keeping charged with current when not needed or being used, and not installing any protective devices or posting and giving any warning, although to its knowledge the construction work on the buildings for the said Laboratory had been going on for several months and the electric line was in close proximity so as to constitute a hazard to the workmen, and although this Company had been requested to remove or disconnect the line adjacent to the construction work, it failed to do so until after the accident. It is set out that the building material as well as the machines, equipment and tools, some of which were long, tall and cumbersome, had to be moved under or over the electric line and used nearby, and

that there was serious and obvious danger of contact being made with the highly charged wires. Rife is charged with using a defective machine and furnishing an incompetent operator therefor, and the careless handling of the machine by the operator.

The defendants, Rife and the Insurance Company, filed answers denying any negligence on the part of Rife or his employees and pleading contributory negligence. The New Orleans Public Service, Inc. filed a motion to dismiss the action for failure to state a claim upon which relief could be granted.

The District Judge on July 10, 1940 entered an order maintaining the motion to dismiss, which order reads as follows:

> "This cause came on for hearing on July 3, 1940, on motion filed by defendant New Orleans Public Service Inc. to dismiss the complaint as to said defendant for failure to state a claim upon which relief can be granted and was argued by counsel for the respective parties and submitted, when the Court took time to consider.
>
> "Whereupon, and on due consideration thereof,
>
> "It is ordered by the Court that said motion be, and the same is, hereby maintained, and the complaint is dismissed as to the defendant, New Orleans Public Service, Inc., at plaintiff's costs."

Petitioner, on July 18, 1940, gave notice of appeal from this order of dismissal to the United States Circuit Court of Appeals for the Fifth Circuit, and the appeal was lodged in that Court on August 20, 1940. After hearing on April 2, 1941, that Court, on May 2, 1941, handed down a decision dismissing the appeal on the ground that the order of dismissal by the District Court was not a final judgment. Petitioner timely applied for rehearing, which was refused on May 31, 1941.

This case is now reported in 119 F. (2d) 465.

II.

Jurisdictional Statement.

Petitioner believes that this Honorable Court has jurisdiction to review the judgment in question, and to issue a writ of certiorari under the Judicial Code, Section 240 amended (28 U. S. C. A. 347), and Judicial Code 262 (28 U. S. C. A. 377). The cases cited below are believed to sustain the jurisdiction, viz.:

Church Street Bldg. Corporation, 57 S. Ct. 88, 299 U. S. 24, 81 L. Ed. 458;

Sibbach v. *Wilson & Co., Inc.,* 61 S. Ct. 422, 309 U. S. 650, 84 L. Ed. 1001;

Palmer v. *Webster & Atlas Nat. Bank of Boston,* 61 S. Ct. 542.

III.

Louisiana Law on Solidary Liability of Co-tort Feasors.

Solidary liability is defined in Article 2091 of the Louisiana Civil Code of 1870 as follows:

> "There is an obligation in solido, on the part of the debtors, when they are all obligated to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor."

Under the Louisiana law, co-tort feasors are liable *in solido.* Suit may be brought against one or both of them, or separate suit may be filed against each. See *Shield* v. *F. Johnson & Son Company, Ltd.,* 132 La. 773, 61 So. 787; *Rumpf* v. *Callo,* 16 La. App. 12, 132 So. 763. In Louisiana, there is no contribution between joint *tort feasors* unless they are cast in one suit. *Quatray* v. *Wicker,* 178 La. 289, 151 So. 208; *Aetna Life Insurance Company* v. *DeJean,* 185 La. 1074, 171 So. 450.

IV.

Question Presented.

Is an order of a District Court dismissing an action as to one of two defendants a final decree so as to be appealable where the action is brought against two defendants as *co-tort feasors* who are charged with separate and distinct acts of negligence, and judgment is sought *in solido* against the defendants under the Louisiana law?

V.

Reasons Relied Upon for Allowance of the Writ.

A.

It is appropriate and desirable that the appellate jurisdiction of the United States Circuit Courts of Appeal as provided by Judicial Code Section 128 amended (28 U. S. C. A. 225) be reappraised and clarified in view of the adoption of the Federal Rules of Civil Procedure. It is believed that these rules may necessitate modification of the judicial interpretations of "final decisions".

Rule 54 (b) of the Federal Rules of Civil Procedure permitting judgment at various stages, reads as follows:

> "JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such condi-

tions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

There are to be further considered Rules 18 and 20 permitting of liberal joinder of claims and defendants.

There is to be further considered Rule 73 (b) wherein it is provided that the Notice of Appeal shall, among other things, designate the judgment or part thereof appealed from.

Two separate claims are presented. As to the claim disposed of, the action is terminated under the provisions of Rule 54 (b). Hence, the order of dismissal of petitioner's claim against the New Orleans Public Service, Inc. would appear to be "final".

B.

There seems to be some conflict in the decisions of the various Circuit Courts of Appeal as to what judgment has the finality required to be appealable where the action is brought against more than one defendant, and there is an order of dismissal as to a defendant. This conflict appears to have existed before the adoption of the Federal Rules of Civil Procedure and still to exist. In the instant case, and also in *Menge* v. *Warriner,* 120 Fed. 816 (1903), the Fifth Circuit Court of Appeals has held that the order of dismissal as to one defendant sued *in solido* with another one lacks the finality requisite for an appeal. That court has not made any distinction between *joint* liability and that *in solido.* The First Circuit Court of Appeals in *Curtis* v. *Connly, et al.,* 264 Fed. 650 (1920) upheld its jurisdiction to entertain an appeal where there was a judgment of dismissal as to certain, but not all, of the defendants, and the plaintiff appealed. The basis of this ruling was that each defendant was under a separate liability, and that a separate action at law might have been brought against him. In *Thompson* v. *Murphy,* 93 F. (2d) 38 (1937) an order attack-

ing service of process as to some of the defendants who were not claimed to be jointly liable with other defendants was held to have completely determined the rights of the defendants affected by it and was reviewable as a "final decision". The order of dismissal of the New Orleans Public Service, Inc., if permitted to stand, appears to completely determine the rights of petitioner against that Company.

Since the adoption of the new Rules, the various Circuit Courts do not seem to have been in accord as to what effect, if any, these Rules may have on the definition of a "final decree," and the judges in the various courts have not always been in unanimity. The Second Circuit Court in *Collins* v. *Metro-Goldwyn Pictures Corporation*, 106 F. (2d) 83 (1939) discussed the inconvenience in deferring the review of the disposition of a claim, though finally disposed of, until other ~~suitable~~ claims have been adjudicated. It was there said that this consideration was undoubtedly the reason for the adoption of Rule 54(b). That court went on to say:

> "The new Rules provide for the presentation of numerous claims and the participation of multiple parties in a single civil action. Rules 13, 14, 18, 20 and 24. Rule 18 authorizes unlimited joinder of claims where there is only one plaintiff and one defendant. It is evident that the court must be given extensive discretionary powers in order to expedite a determination of the issues and avoid delay and inconvenience. Rule 42(b) conferring power to order a separate trial of any claim or any separate issue, and Rule 54(b) conferring power to enter separate judgments at various stages, appear to have been designed to meet the difficulties arising from these liberal joinder provisions."

See further, *Bowles* v. *Commercial Casualty Insurance Company*, 107 F. (2d) 169 (C. C. A. 4th, 1939); *Sidis* v. *F. R.*

Publishing Company, 113 F. (2d) 806 (C. C. A. 2nd, 1940). Judge Clark dissented in the latter case.

In *Atwater* v. *North American Coal Corporation,* 111 F. (2d) 125 (1940) the Second Circuit Court distinguished the appeal therein from *Collins* v. *Metro-Goldwyn Pictures Corporation, supra,* since "that was not a case where the dismissal touched some but not all defendants." In *Atwater* v. *North American Coal Corporation,* the defendants were charged jointly in four counts. Dismissal was not complete as to all counts, or as to any defendant. Judge Clark concurred pointing out that "the defendants have obtained nothing of substance by the partial dismissal below."

C.

The United States Supreme Court does not appear to have expressly ruled on the appealability or not of an order dismissing the suit as to one of the defendants claimed to be liable *in solido* where separate, yet concurrent, acts of negligence are charged against the defendants, and the State law permits of separate suits against the defendants. It is respectfully suggested, however, that the appeal in the instant matter is within the spirit and intendment of the exception recognized by this Honorable Court to the general rule that an appeal may be only from a final judgment. The controversy between petitioner and the New Orleans Public Service, Inc., is separable from that between petitioner and Rife. The order of dismissal herein disposed entirely of petitioner's claim against the New Orleans Public Service, Inc., and at the trial of the suit against the remaining defendants, petitioner would not be permitted to offer evidence as to the negligence charged to that Company. As to the exception to the general rule recognized by this Court, see *Hill* v. *Chicago, etc., R. R.,* 140 U. S. 52, 11 S. Ct. 690, 35 L. Ed. 331; *Collins* v. *Miller,*

252 U. S. 364, 370, 40 S. Ct. 347, 349, 64 L. Ed. 616; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339.

VI.

Petitioner presents to this Court and files herewith a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals for the Fifth Circuit.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket "No. 9644, Doris Shipman Hunteman, Individually and as Guardian, etc., Appellant, versus New Orleans Public Service, Inc., et al., Appellee" to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and for such further relief as to this Court may seem proper.

New Orleans, Louisiana, July 3rd, 1941.

DORIS SHIPMAN HUNTEMAN,
Petitioner,

By JNO. W. HARRELL,
Of New Orleans,
Counsel for Petitioner,

JAMES W. HOPKINS,
Of New Orleans,
Of Counsel for Petitioner.

(5246)

Office - Supreme Court, U. S.
FILED
AUG 21 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 254

DORIS SHIPMAN HUNTEMAN, Individually and as Guardian, Etc.,

Petitioner,

versus

NEW ORLEANS PUBLIC SERVICE INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WILLIAM W. OGDEN,
Counsel for Respondent and Appellee.

ALVIN R. CHRISTOVICH,
Of Counsel for Respondent and Appellee.

INDEX.

Subject Index.

Statement of the Matter Involved 2

A Summary Discussion of the Reasons Relied Upon by Petitioner for Allowance of the Writ 2

Table of Cases Cited.

Arnold v. Guimarin, 263 U. S. 427, 44 S. Ct. 144, 68 L. Ed. 371 4

Atwater v. North American Coal Corporation, et al., 111 Fed. (2d) 125 ..... 3, 4

Bank of Rondout v. Smith, 156 U. S. 330, 15 S. Ct. 358, 39 L. Ed. 441 4

Bush v. Leach, et al., 22 Fed. (2d) 296 4

Collins v. Metro-Goldwyn Pictures Corporation, 106 Fed. (2d) 83 3

Collins v. Miller, 252 U. S. 364, 40 S. Ct. 347, 64 L. Ed. 616 ..... 2, 4, 5

Curtis v. Connly, 264 Fed. 650 5

Defiance Water Co. v. Defiance, 191 U. S. 184, 194, 48 L. Ed. 140, 144, 24 S. Ct. 63 2

Fields v. Mutual Benefit Life Ins. Co., 93 Fed. (2d) 961 5

General Electric v. Allis-Chalmers, 194 Fed. 413 2

Hewitt v. Charles R. McCormick Lumber Co., et al., 22 Fed. (2d) 925 4

Hill v. Chicago, 140 U. S. 52, 11 S. Ct. 690, 35 L. Ed. 331 5

Hohorst v. Hamburg American Packet Co., 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443 ..... 4, 5, 6

Karl Kiefer Machinery Co. v. U. S. Bottlers Machine Co., 108 Fed. (2d) 469 3

Menge v. Warriner, 120 Fed. 816 ..... 2, 4, 5

Moore's Federal Practice, Volume 3, pages 3155, et seq., and 66, et seq., 1940 Supp. 3

Roller v. Burkett, et al., 156 Fed. 1023 4

Thompson v. Murphy, 93 Fed. (2d) 38 5

The United States v. Girault, et al., 11 How. 22, 13 L. Ed. 587 4

United States v. River Rouge Improvement Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339..... 5

Statutes Cited.

Federal Rules of Civil Procedure:

Rule 54 (b) 3

Rule 82 3

Louisiana Civil Code of 1870, Article 2091 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 254

DORIS SHIPMAN HUNTEMAN, Individually and as Guardian, Etc.,

Petitioner,

versus

NEW ORLEANS PUBLIC SERVICE INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

This brief on behalf of New Orleans Public Service Inc., respondent and appellee below, is filed in opposition to the petition of Doris Shipman Hunteman, individually and as Guardian, Etc., for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

1.

STATEMENT OF THE MATTER INVOLVED.

The statement of the matter involved contained in the petition for writ of certiorari by Doris Shipman Huteman is a correct statement.

2.

A SUMMARY DISCUSSION OF THE REASONS RELIED UPON BY PETITIONER FOR ALLOWANCE OF THE WRIT.

The United States Circuit Court of Appeals for the Fifth Circuit dismissed the appeal herein, for lack of finality of judgment necessary to confer jurisdiction upon that Court, on the authority of *Menge v. Warriner*, 120 Fed. 816; *General Electric Co. v. Allis-Chalmers Co.*, 194 Fed. 413, and *Hohorst v. Hamburg American Packet Co.*, 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443, and other authorities cited in the opinion which is reported in 119 Fed. (2d) 465.

The fundamental question, whether the judgment appealed from was a final one within the meaning of the rule, was one which would suggest itself to the Court, and respondent and appellee feeling that it was its duty to raise the question, did so by motion to dismiss the appeal. *Collins v. Miller*, 252 U. S. 364, 40 S. Ct. 347, 64 L. Ed. 616; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, 48 L. Ed. 140, 144, 24 S. Ct. 63.

The first ground upon which petitioner relies for allowance of the writ is the suggestion that the appellate

jurisdiction of the United States Circuit Courts of Appeal should be reappraised and clarified in view of the adoption of the Federal Rules of Civil Procedure.

As was pointed out by Judge Holmes, in the opinion of the Court herein, the Federal Rules of Civil Procedure are not intended to affect either the jurisdiction of the District Courts with whose procedure they deal, nor the jurisdiction of the Appellate Courts to which they are not directed. *Rule 82 of the Federal Rules of Civil Procedure.* A treatment of this question in detail will be found in *Moore's Federal Practice*, Vol. 3, pages 3155, et seq., and at pages 66, et seq., 1940 supp.

In that connection petitioner cites *Rule 54 (b) of the Federal Rules of Civil Procedure* permitting judgment at various stages. She suggests that the rule applied in *Karl Kiefer Machinery Co. v. U. S. Bottlers Machine Co.*, 108 Fed. (2d) 469, and *Collins v. Metro-Goldwyn Pictures Corporation*, 106 Fed. (2d) 83, should be followed in the case under argument. There, however, appeals were taken from orders of dismissal on separable claims or perhaps separable causes of action. Be that as it may, the Court itself, in our opinion, in the *Collins* case distinguished the kind of a situation which prevailed there and in the *Kiefer* case from the one under argument. In *Atwater v. North American Coal Corporation, et al.*, 111 Fed. (2d) 125, in discussing possible application of the *Collins* case to such a situation as we have here, the Court said:

> "The situation in *Collins v. Metro-Goldwyn Pictures Corporation* was different. That was not a case where the dismissal touched some but not all defendants."

The second and third grounds upon which petitioner relies touch each other and seem to suggest a conflict in the decisions of the various Circuit Courts of Appeal upon the subject matter involved, and lack of distinction in those cases involving joint liability with a case involving liability *in solido.* It is suggested by petitioner that some distinction should be made in view of *Article 2091 of the Louisiana Civil Code of 1870.*

The instant suit was filed by Mrs. Hunteman, alleging joint and concurrent negligence on the part of the two defendants, and her prayer asks for a judgment *in solido* against them. The general rule with respect to appeal is that a judgment or order dismissing an action as to less than all of several defendants jointly charged is not a final decision for purpose of appeal. *The United States v. Girault, et al.,* 11 How. 22, 13 L. Ed. 587; *Bank of Rondout v. Smith,* 156 U. S. 330, 15 S. Ct. 358, 39 L. Ed. 441; *Hohorst v. Hamburg Packet Co.,* 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443; *Collins v. Miller,* 252 U. S. 364, 40 S. Ct. 347, 64 L. Ed. 616; *Arnold v. Guimarin,* 263 U. S. 427, 44 S. Ct. 144, 68 L. Ed. 371; *Menge v. Warriner,* 120 Fed. 816; *Roller v. Burkett, et al.,* 156 Fed. 1023; *Bush v. Leach, et al.,* 22 Fed. (2d) 296; *Hewitt v. Charles R. McCormick Lumber Co., et al.,* 22 Fed. (2d) 925; *Atwater v. North American Coal Corp., et al.,* 111 Fed. (2d) 125.

It is interesting to note in connection with petitioner's suggestion of distinction between joint liability

and *in solido* liability that the *Menge* case, *supra*, was decided by the Fifth Circuit Court of Appeals, the case coming from the Eastern District of Louisiana.

In view of the general rule above stated, which has consistently prevailed, there seems to be no reason or cause for making any strained distinction between joint liability and liability *in solido*.

Finally petitioner suggests conflict because of exceptions to the general rule found in *Hill v. Chicago*, 140 U. S. 52, 11 S. Ct. 690, 35 L. Ed. 331, and *Collins v. Miller*, 252 U. S. 364, 370, 40 S. Ct. 347, 349, 64 L. Ed. 616, and *United States v. River Rouge Co.*, 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339.

These cases are easily distinguishable from the cases formulating and adhering to the general rule. To demonstrate the difference between the three last cited cases and the situation which we have in the case under argument, see the *Hohorst* case, *supra*, 148 U. S. 262, at page 264. See also *Fields v. Mutual Benefit Life Insurance Co.*, 93 Fed. (2d) 961.

The cases of *Curtis v. Connly, et al.*, 264 Fed. 650, and *Thompson v. Murphy*, 93 Fed. 38, both referred to by plaintiff in her brief at page 6, can be distinguished either because the defendants were not claimed to be jointly liable or because they fall within the exception to the general rule as exemplified by *Hill v. Chicago*, supra, and therefore

do not touch the situation which we have in the case under argument.

We submit, therefore, that in the instant case, being one in which several defendants are sought to be jointly held, the general rule as applied in the *Hohorst* and other cases cited above should apply.

Respectfully submitted,

NEW ORLEANS PUBLIC SERVICE INC.,
Respondent and Appellee.

By William W. Ogden,
of New Orleans,
Counsel for Respondent and Appellee.

Alvin R. Christovich,
of New Orleans,
of Counsel for Respondent and Appellee.